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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE JAMES R. HOLLOWAY,
Petitioner

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF AMICUS CURIAE FOR THE PUBLIC DEFENDER SERVICE AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER

ANGELA JORDAN DAVIS
DIRECTOR
JAMES W. KLEIN
CHIEF, APPELLATE DIVISION
DAVID A. REISER*
SPECIAL LITIGATION COUNSEL
PUBLIC DEFENDER SERVICE
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200

Attorneys for Amici
* Counsel of Record

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INTERESTS OF AMICI CURIAE[1]

The Public Defender Service (PDS) for the District of Columbia was established by Congress to provide representation to indigent persons accused of crimes in the local and federal courts of the District of Columbia. D.C. Code §§ 1-2701-2708. The National Legal Aid and Defender Association (NLADA) is a private, non-profit membership

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[1] Letters of consent, pursuant to Rule 37.2, have been filed with the Clerk.

organization based in Washington, D.C. Its purpose is to assure the availability of quality legal services in criminal and civil cases to persons financially unable to retain counsel. The membership of NLADA includes most public defender offices around the country, as well as many assigned defense counsel. Both PDS and NLADA have an interest in maintaining high standards for zealous, effective, and ethical advocacy by lawyers for indigent criminal defendants. PDS and NLADA have participated as *amici* in other proceedings before this Court, including a joint Brief filed last Term in *United States v. Lowell Green*, No. 91-1521. PDS also represented the Respondents last Term in *United States v. Dixon*, 113 S.Ct. 2849 (1993), a case involving the special attributes of criminal contempt. *Amici* submit that the summary contempt procedure followed here needlessly pits lawyer against client and may have a significant and undesirable chilling effect on the representation of indigent criminal defendants.

STATEMENT

Before the trial during which he was held in contempt began, Petitioner, an Assistant Federal Public Defender, sought leave to withdraw because of his fear that friction that had developed between himself and the trial judge in an earlier trial could harm his client. The district judge denied this request. *In re Holloway*, Pet. App. 28a (Mikva, Ch.J., dissenting). The trial which followed was punctuated by acrimonious exchanges involving other defense counsel as well as Petitioner. As Chief Judge Mikva summarized it in his opinion dissenting from the affirmance of Petitioner's client's conviction:

> The trial was long and arduous. Tensions ran high between the trial judge and virtually all of the attorneys; biting sarcasm from the bench was not infrequent, nor were the attorneys always on their best behavior. The frustration and impatience which pervaded the entire proceeding is apparent from the most casual reading of the transcript. It seems that the trial judge, as well as the attorneys, were nothing short of relieved when the trial finally drew to a close.
>
> Almost lost in the clamor of the trial were the defendants, the individuals whose fate rested in the proceedings at hand. They quite possibly wondered to themselves whether they could receive a fair trial in this courtroom, in front of this jury. They were right to wonder.

United States v. Logan, 998 F.2d 1025, 1033 (D.C. Cir. 1993).

The district court held Petitioner in contempt for violating an order forbidding him from asking a police officer called as a defense witness about an affidavit photocopied from the officer's police report "unless [the witness] had seen the affidavit before." *In re Holloway*, Pet. App. 8a. In a written motion filed the following day, Petitioner again moved to withdraw on the grounds that:

> This contempt ruling has put the defendant's counsel in a conflict of interest situation relative to the interests of the defendant in this case. Counsel has explained to the defendant that counsel's interests in avoiding being fined or sentenced at the end of the trial has eviscerated his ability to be a zealous

> advocate for the defendant. Moreover, counsel's impending sentence at the conclusion of this trial has severely distracted him from the preparation of his closing argument. Counsel has been unable to sleep and concentrate totally on the presentation of the defendant's case . . . . Counsel's family, personal and professional life have been deeply affected . . . . The possibility of substantial fine or a period of incarceration has caused considerable fear, uncertainty and anxiety among counsel and his wife. Accordingly, counsel's effectiveness has been undermined and threatens to affect his performance during the remainder of the trial.

United States v. Logan, 998 F.2d at 1035. The district court again refused to allow Petitioner to withdraw. *Id.* at 1036. A majority of the Court of Appeals concluded that the conflict between Petitioner and the district judge did not deprive his client of zealous representation, citing a motion for mistrial and a subsequent "acerbic exchange" with the district judge. *Id.* at 1029. Five months after the trial, the trial judge sentenced Petitioner to pay a $1,000 fine.[2]

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[2] Before sentencing, the district court denied Petitioner's motion to vacate the contempt finding, to hold a hearing pursuant to Fed. R. Crim. P. 42(b), and to refer the matter to another judge. The court ruled that "the merits of the underlying contempt order is not properly before the court at a sentencing hearing," so it is clear that the written representations in the motion and the opportunity to allocute were not equivalent to the right to contest a contempt funding under Rule 42(b). The district judge did, however, go on to reject Petitioner's written representations that he thought the court's order was ambiguous and that he did not willfully violate the order. In his allocution before sentencing, Petitioner reaffirmed his regret over the incident and his good faith.

REASONS FOR GRANTING THE WRIT

We urge the Court to grant review and to reverse Petitioner's contempt conviction because the district court should not have found Petitioner guilty of a crime without a hearing when he was not "punished summarily," pursuant to Fed. R. Crim. P. 42(a). The rule itself authorizes summary punishment, not summary adjudication and deferred sentencing. The threat of punishment yet to come was much more chilling than an immediate sentence would have been: here, Petitioner's own liberty lay precariously in the hands of the same judge he might legitimately challenge, although he could not disobey, as the advocate for the accused. Moreover, the trial court had a less drastic option available to enforce its evidentiary ruling; since there was no immediate need to punish it could have ordered Petitioner to show cause why he should not be held in contempt, rather than finding him guilty on the spot. A formal hearing would not have eliminated entirely the tension between Petitioner's interest and his client's, but it would have given him an opportunity to defend himself after the client's trial was over, reducing the probability that the conflict of interest would infect the client's trial. We submit that the Court's longstanding concern for the representation of the indigent by independent, conflict-free counsel, should inform its construction of Rule 42, and justifies review of the judgment below.

This case also merits review to resolve the tension between two of this Court's prior decisions, *Sacher v. United States*, 343 U.S. 1 (1952), and *Taylor v. Hayes*, 418 U.S. 488 (1974), in light of the significant developments in the law of criminal contempt since *Sacher* was decided. Summary contempt was not the "least possible power," *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821), adequate to

protect the trial from disruption. If immediate sentencing is not required to vindicate the court's authority, the court should conduct a hearing pursuant to Fed. R. Crim. P. 42(b), rather than making a summary determination of guilt under Rule 42(a).

1. The exercise of the contempt power must be guided by principles of necessity and restraint. *Young v. United States ex rel. Luis Vuitton et fils*, 481 U.S. 787, 793 (1987); *United States v. Wilson*, 421 U.S. 309 (1975). This is particularly so of the summary contempt power codified in Federal Rule of Criminal Procedure 42(a), because summary contempt proceedings depart from the requirements of "procedural regularity," ordinarily demanded of a criminal conviction. *Harris v. United States*, 382 U.S. 162, 167 (1965); *Taylor v. Hayes*, 418 U.S. at 498. "Summary punishment always, and rightly, is regarded with disfavor." *Sacher v. United States*, 343 U.S. at 8. This Court may regulate federal criminal contempts through its supervisory power, as well as through statutory and constitutional interpretation. *Young*, 481 U.S. at 799; *Offutt v. United States*, 348 U.S. 11, 14 (1954). In *Young*, the Court prohibited the appointment of the attorney for an interested party to prosecute non-summary criminal contempts under Fed. R. Crim. P. 42(b), because of the "potential for private interest to influence public duty." 481 U.S. at 805. Similarly, the Court should forbid the use of summary procedures to adjudicate contempts which create unnecessary conflicts between a lawyer's private interest to avoid punishment and the lawyer's public duty to provide zealous representation.

2. The Sixth Amendment right to counsel, "fundamental to our system of justice, is meant to assure fairness in the adversary criminal process." *United States v.*

Morrison, 449 U.S. 361, 364 (1981); *accord Lockhart v. Fretwell*, 113 S.Ct. 838, 842 (1993); *United States v. Cronic*, 466 U.S. 648, 653 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). The hallmark of advocacy within this system is the defense lawyer's independence and undivided loyalty to the client. *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979); *Polk County v. Dodson*, 454 U.S. 312, 319, 322 (1981); *id.* at 327 (Burger, C.J., concurring); *Wood v. Georgia*, 450 U.S. 261, 269 (1981); *Burger v. Kemp*, 483 U.S. 776, 784 (1987); *McCoy v. Wisconsin Court of Appeals*, 486 U.S. 429, 445-46 (1988); *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *Glasser v. United States*, 315 U.S. 60, 76 (1942). "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips in crucial matters." *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct a defense." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The courts have a responsibility to assure the fairness of proceedings by identifying and preventing conflicts of interest which may impair counsel's independence or divide counsel's allegiance. *Wheat v. United States*, 486 U.S. 153, 160 (1988); *Wood v. Georgia*, 450 U.S. at 269; *Glasser*, 315 U.S. at 76. Courts have a special obligation to protect defendants who cannot retain counsel of their own, and who must accept the lawyer chosen for them.

3. The federal courts of appeals have recognized that a defense lawyer who faces prosecution, criminal investigation, or disciplinary action may have an actual conflict of interest which presumptively impairs a criminal defendant's right to counsel because it gives the lawyer a self-interest in foregoing vigorous advocacy.[3] In this context, as

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[3] *United States v. Grieg*, 967 F.2d 1018,1020-1026 (5th Cir. 1992) (conflict based upon defense counsel's potential prosecution or professional discipline as a result of obstruction of witness); *United States v. Balzano*, 916 F.2d 1273, 1292-93 (7th Cir. 1990) (trial court adequately explored conflict based on unrelated tax investigation of attorney before trial); *United States v. Lowry*, 971 F.2d 55, 61-63 (7th Cir. 1992) (defendant waived conflict based on government's investigation of attorney); *Taylor v. United States*, 985 F.2d 844, 846-47 (6th Cir. 1993) (indictment of attorney on state charges following defendant's federal trial did not establish actual conflict); *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) (investigation of lawyer for bribing police officers may have created a conflict); *United States v. Miskinis*, 966 F.2d 1263, 1267-69 (9th Cir. 1992) (record insufficient to determine whether conflict existed based upon lawyer's interest in avoiding discipline); *United States v. Fulton*, 5 F.3d 605, 609-611 (2d Cir. 1993) (allegation by government witness that defense counsel was engaged in related criminal conduct creates non-waivable conflict); *United States v. Jimenez*, 928 F.2d 356, 361-363 (10th Cir.) (no actual conflict since both counsel and client had similar interests with respect to dissemination of grand jury material), *cert. denied*, 112 S.Ct. 164 (1991); *United States v. McLain*, 823 F.2d 1457, 1463-64 (11th Cir. 1987) (investigation and subsequent prosecution of defense counsel created actual conflict); *United States v. Jones*, 900 F.2d 512, 518-520 (2d Cir.) (prosecutor's unfounded allegations of criminal conduct did not create an actual conflict), *cert. denied*, 498 U.S. 846 (1990); *United States v. Cancilla*, 725 F.2d 867, 870-71 (2d Cir. 1984) (commission by defense counsel of related crimes gave counsel a motive for less vigorous representation and creates an actual conflict); *United States v. Salinas*, 618 F.2d 1092, 1093 (5th Cir.) (disqualifying counsel despite waiver because of involvement in investigation of related offenses); *Mannhalt v. Reed*, 847 F.2d 576, 580-84 (9th Cir.) (counsel was

(continued...)

in many others, contempt is "a crime in the ordinary sense." *United States v. Dixon*, 113 S.Ct. 2849, 2856 (1993) (citation omitted). By holding Petitioner in contempt mid-trial, but deferring imposition of sentence until after the trial was over, the district judge maximized the conflict between Petitioner's interests and those of his client. "[A]s soon as [the district judge] held [Petitioner] in contempt, he was on notice that something would happen, possibly something quite drastic." *In re Holloway*, Pet. App. 15a. If the judge had sentenced him immediately, Petitioner would not have had to worry about whether antagonizing the judge would increase his punishment, as long as he steered clear of contempt. If, on the other hand, the judge had issued a show cause order and deferred the contempt adjudication until after trial, Petitioner would have gained the opportunity to present his own defense after his client's case was resolved.[4] Instead, Petitioner

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[3] (...continued)
accused of related crimes and had actual conflict of interest), *cert. denied*, 488 U.S. 908 (1988); *Cerro v. United States*, 872 F.2d 780, 783-784 (7th Cir. 1989) (no actual conflict of interest because government already knew of counsel's alleged involvement in related criminal activity); *United States v. Novak*, 903 F.2d 883, 890 (2d Cir. 1990) (actual conflict because counsel fraudulently procured license); *Solina v. United States*, 709 F.2d 160, 167 (2d Cir. 19983) (actual conflict because counsel failed the bar); *Bellamy v. Cogdell*, 974 F.2d 302, 306-8 (2d Cir. 1992) (misrepresentations did not create an actual conflict requiring per se reversal), *cert. denied*, 113 S.Ct. 1383 (1993).

[4] More process could have made a difference in this case. The Court of Appeals found it "difficult to tell exactly what [Petitioner] was trying to achieve," *In re Holloway*, Pet. App. at 5a, in his examination of Officer Young. We believe there was a legitimate purpose for the examination which Petitioner should have presented to the court. Had he done so, we believe the judge would have agreed that her ruling preventing Petitioner
(continued...)

appeared before the court both as advocate and as a convicted but unsentenced criminal, whose guilt had been determined but whose punishment was in the broad sentencing discretion

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[4] (...continued)
from asking about the contents of a document the witness had not seen before was designed to protect the witness from unfair surprise, not to block counsel from laying a foundation for a document by asking a witness to identify it as a copy of his own police report. We think a calm and cogent presentation would have persuaded the judge to allow Petitioner to ask Officer Young whether he recognized the affidavit (as a photocopy) once he had an opportunity to review it.

Petitioner had no right to violate the judge's order, but he did not commit a crime if he mistakenly believed his final question complied with the order, given the limited purpose for which he wanted Young to identify the affidavit. He should have been given the opportunity, before conviction, to "urge that his behavior was not contempt but the acceptable conduct of an attorney representing his client," *Taylor v. Hayes*, 418 U.S. at 499, and that he did not willfully violate the judge's order. He might have stressed the importance of the inconsistency between Truesdale's trial testimony and the affidavit submitted to the district court by the United States as a basis for seeking detention, because Truesdale was the only one of three officers entering the room who claimed to have seen the defendant make an expansive gesture to discard drugs, under circumstances in which a more discreet drop to the floor would have been difficult to observe. He might have explained that he needed to link the affidavit signed by a third officer to Truesdale through Young because the affidavit was a copy of Young's police report based upon Truesdale's statement to him. Petitioner might have explained that an affidavit might carry more weight with the jury than a police report, and might be admissible as a party admission by the government, *see United States v. Morgan*, 581 F.2d 933 (D.C. Cir. 1978). He might also have explained the difficulty he encountered in framing appropriate non-leading questions to an uncooperative witness he was forced to call on direct examination. These explanations might well have carried more weight in a formal hearing than Petitioner's written submission or his allocution before sentencing.

of the district judge. Under these circumstances, Petitioner had to chose between imperiling his own welfare or his client's. *See* D.C. Rules of Professional Conduct 1.7(b)(4) (lawyer shall not represent a client when the lawyer's judgment may be affected by lawyer's personal interest); American Bar Association, *Standards for Criminal Justice: The Defense Function* 4-3.5 (3d ed. 1993) (defense counsel should not allow personal interests to influence professional judgment). Sometimes, mid-trial summary punishment cannot be avoided, but courts should not create conflicts between appointed counsel and their clients through the exercise of the summary contempt power except when, and only to the extent, "necessary to protect the judicial institution itself." *Harris*, 382 U.S. at 167.

4. The Court should grant review to clarify whether hybrid contempt procedures which do not fit either the summary or plenary provisions of Rule 42 conform to the rule of necessity. The decision below is in conflict with decisions of the United States Court of Appeals for the Second Circuit, which has disapproved summary contempt under similar circumstances.[5] In *Sacher v. United States*, 343 U.S. at 11, this Court upheld the authority of a district judge to defer summary contempt proceedings, in their entirety, until after the trial was over, in the belief that this procedure minimized the prejudice to the accused. *Sacher* does not control this case, because Petitioner was found guilty during trial; only his sentencing was deferred. But *Sacher* also rejected the proposition that summary contempt

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[5] *United States v. Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984); *see also United States v. Stratton*, 779 F.2d 820, 836 (2d Cir. 1985) (upholding sentencing of pro se defendant at the end of the trial day), *cert. denied*, 476 U.S. 1162 (1986).

procedures may be used only when immediate punishment is required because "it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment." 343 U.S. at 11. Subsequently, in *Taylor v. Hayes*, 418 U.S. at 498-99, the Court held that "where conviction and punishment are delayed," due process requires notice and a hearing on the contempt charge, and reversed contempt judgments entered after trial on the basis of contempt findings made while the trial was in progress. *Taylor* casts doubt on the continued validity of *Sacher* as authority for deferred summary contempt proceedings. *Sacher* antedates important developments in the law of criminal contempt, *e.g.*, *Bloom v. Illinois*, 391 U.S. 194 (1968). The rule of necessity which has become central to this Court's contempt jurisprudence is inconsistent with post-trial summary contempts.

"Swiftness was not a prerequisite of justice here." *Harris*, 382 U.S. at 164. Petitioner had the worst of both worlds: the judge pronounced him guilty while "smarting under the irritation of the contemptuous act," but hung the sentence over the remainder of the trial so that it threatened Petitioner's client as well as himself. The construction of Rule 42 advanced by Petitioner reduces the likelihood that friction between an attorney and the court will jeopardize a criminal defendant's constitutional right to counsel, and properly reserves summary contempt for those rare instances when it is necessary.

CONCLUSION

The writ should be granted; Petitioner's contempt conviction should be reversed.

Respectfully submitted,

ANGELA JORDAN DAVIS
DIRECTOR
JAMES W. KLEIN
CHIEF, APPELLATE DIVISION
DAVID A. REISER*
SPECIAL LITIGATION COUNSEL
PUBLIC DEFENDER SERVICE
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200

Attorneys for Amici

* Counsel of Record